

# **Uniformed Services Employment And Reemployment Rights Act (USERRA)**

## **Definition**

Section 4303 of Title 38, United States Code, contains a number of definitions, which must be kept in mind when applying the law to a civilian employment rights scenario. For example, the law protects persons who perform service in the uniformed services. "Service" includes active or inactive duty under federal authority, but does not include state call-ups of members of the Army or Air National Guard (The term "employer," as it applies to National Guard technicians, refers to the Adjutant General of the state. Thus, National Guard technicians on other than active or inactive duty for training are considered to be state employees and are not afforded protection under USERRA.) "Uniformed services" includes the active and Reserve Components of the Armed Forces, the Army and Air National Guard, the Commissioned Corps of the Public Health Service, and any other category of persons designated by the President in time of war or emergency.

## **Discrimination**

USERRA prohibits discrimination in hiring, retention, promotions, or other benefits of employment against a person because that person "is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in a uniformed service...." In addition, employers are prohibited from reprisal against anyone who exercises USERRA rights or anyone who assists in the exercise of those rights by testifying or otherwise participating in an investigation, even if that person has no military connection.

## **Qualifying**

In order to qualify for reemployment rights following military service, you must meet the following five eligibility criteria:

- You must have left a civilian job;
- you must have given notice that you were leaving to perform military service;
- the cumulative period of service must not have exceeded five years (there are exceptions);
- you must have been released from service under honorable or general conditions; and
- you must have reported back to work or applied for reemployment within time constraints prescribed by law.

## **Notice**

Under USERRA, you must give your employer advance notice (either written or verbal) of upcoming military service of any type. Otherwise, you will not be eligible for reemployment protection following the period of military service. The only exceptions to the notification requirement would be if the giving of notice is precluded by military necessity (e.g. a classified recall) or if it is otherwise impossible or unreasonable to give notice. These exceptions are expected to be very rare. Your best course of action is to give as much advance notice to your employer as possible. See the sample notification letter on page 84.

### Five-Year Limit

USERRA sets a five-year cumulative limit on the amount of military leave you can perform and retain reemployment rights with a given employer. If you get a new employer, you get a new five-year limit. There are some important exceptions to the five-year limit. If you are unable to obtain release or if service is required to complete an initial period of obligated service, that time of service is exempt (examples: An initial enlistment may last more than five years, such as for nuclear power training. In this case, an employee retains reinstatement rights with the employer. If an employee was hospitalized for or is convalescing from an illness or injury incurred in, or aggravated during military service, the limit may be extended up to an additional two years.) Drills (inactive duty training), annual training, involuntary active duty extensions (including training certified as necessary by your service), and recalls due to a war or national emergency are not counted in the five-year cumulative total. USERRA clearly establishes that reemployment protection does not depend on the timing, frequency, duration, or nature of an individual's service. USERRA clarifies that while an individual is performing military service, he or she is deemed to be on a furlough or leave of absence and is entitled to the non-seniority rights accorded other individuals on nonmilitary leaves of absence. If the same employer employed you both before and after USERRA's effective date of December 12, 1994, duty that you performed under the previous law will count against the USERRA five-year limit.

### Reemployment Procedures

The type of military duty performed doesn't relate to getting your job back. Reinstatement is strictly based on the duration of the uniformed service. For periods of military service **up to 30 days**, you must report back to work at the **next** regularly scheduled shift on the day following release from the military, safe travel home, and eight hours of rest. For longer periods of services, reinstatement is not necessarily immediate, but should be within a matter of days or at most a few weeks. Following a period of service of **31-180 days**, you must apply for reemployment within **14 days following release**. Following a period of service of **181 days or more**, you must apply for reemployment within **90 days** after release. In applying for reemployment, you should identify yourself, state that you left that employer to perform military service, that you have completed the service and want to be reinstated. Failure to return to work or apply for reemployment within the specified time limits through your own fault does not necessarily forfeit your reemployment rights, but makes you subject to the employer's rules concerning unauthorized absence from work.

### Reemployment Position

Employees returning from military service must be reemployed in the job that they would have attained had they not been absent for military service (the long-standing 'escalator' principle) and with the same seniority, status and pay, as well as other rights and benefits determined by seniority. Reasonable efforts must be made to enable returning employees to refresh or upgrade their skills to enable them to qualify for reemployment. If refresher training is not successful, USERRA provides that the employee must be reinstated in a position that most nearly approximates that position originally held. Employees who are disabled (temporarily or permanently) due to military service must also be accommodated in a position most nearly approximating the original position.

## **Reemployment Entitlements**

Following a period of military service, if you meet the eligibility criteria discussed above, you have a number of specific entitlements. You are entitled to prompt reemployment. You are entitled to seniority, seniority-related benefits (including pension), status, and rate of pay as if you were continuously employed during the military absence. You are entitled to immediate reinstatement of health insurance for you and previously covered dependents, with no waiting period and no exclusion of preexisting conditions, except conditions determined by the Government to be service-connected. You are entitled to training or retraining by your employer if that is necessary to qualify you for the reemployment. If you were disabled while on military duty, or a disability is aggravated by military service, your employer must make reasonable efforts to accommodate the disability. If your period of service was 181 days or more, you are protected from discharge, except for cause, for one year. If the service was for 31-180 days, the period of protection from discharge is 180 days.

## **Documentation**

Following a period of service of 31 days or more, be prepared to provide documentation to the employer which establishes that: your application for reemployment was timely; you have not exceeded the cumulative five-year limit; and, the character of your service was "honorable" (i.e., you did not receive a punitive type of discharge). If the documentation is not readily available, or doesn't exist, the employer can't deny you reemployment, but if documentation later becomes available that shows you did not qualify for reemployment, the employer may immediately terminate you. Suggested forms of documentation could include a DD Form 214, endorsed orders, or a letter from your command.

## **Health Care**

If the period of service is 30 days or less, you pay the normal employee cost, if any, for the coverage. USERRA provides that you may elect to continue employer-provided health insurance for a period up to the first 18 months of your military service. If the period of service is 31 days or more, you could be required to pay up to 102 percent of the total premium. In addition to this special entitlement, you are also entitled to any non-seniority-related benefits that the employer offers to employees on nonmilitary leaves of absence (e.g. jury duty).

## **Pensions**

Under USERRA, all pension plans in which benefits are earned for length of service are protected. Employers are also required to fund any obligation attributable to the employer of the employee's benefit pension plan.

## **Vacations**

For a period of military service, you may elect to use any personal vacation you have accrued with your employer. The employer cannot require you to use vacation. You do not accrue civilian vacation during a period of military service unless your employer provides this as a benefit for employees on a nonmilitary, non-pay leave of absence of similar duration.

**Assistance/Enforcement**

If you experience employment problems because of your military obligations, you should first notify your command. Often a commander or legal officer can provide prompt and effective assistance in resolving disputes between you and your civilian employer. If local efforts fail, contact the National Committee for Employer Support of the Guard and Reserve (ESGR):

ESGR National Headquarters:

Phone: 1-800-336-4590 or DSN 426-1390/91

Website: [www.esgr.org](http://www.esgr.org)